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No. 84-1273

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Petitioner,
v.
SCOTT E. EWING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

ARGUMENT

I. RESPONDENT IN FACT CONTENDS FOR THE SUBSTANTIVE REVIEW OF ACADEMIC DECISIONS THAT HIS BRIEF ACKNOWLEDGES TO BE IMPROPER.

Respondent now contends that the only issue presented is whether the University has acted arbitrarily and capriciously by failing to follow a supposed "rule" requiring retests for all students who fail the NBME Part I examination. Res. Brief 8-9, 32-34. He pretends to deplore judicial review of the merits of academic decisions and commends the court of appeals' "appropriately limited" substantive review. *Id.* at 32. These arguments ignore the undisputed facts and try to flee—unsuccessfully—from the court of appeals' unprecedented intrusion into academic decisionmaking. Pet. App. 33a.

A. Ewing Had Specific Notice that Failure of the NBME Would be Grounds for Dismissal.

The record is clear on the events surrounding Ewing's failure of the NBME examination. He had received a written warning that any future deficiency would be grounds for his dismissal from the medical school. J.A. 146. Failure of the examination was itself regarded as such a "deficiency." J.A. 72 and 128. Ewing himself conceded that when he took the test he knew it was "critical" to his future at the school. J.A. 141-142. After he failed the examination, the faculty concluded that Ewing had been given many opportunities to overcome his record of substandard performance and that the terms of the warning should be enforced. J.A. 137-142.

Respondent tries to avoid these critical facts by misstating or confusing them. He says that, since he rectified the deficiency that had placed him on warning, he somehow earned the right to accumulate new deficiencies in the future. Res. Brief at 38-42. The fact of the matter is that Ewing's cure of the past deficiency only permitted him to remain as a student. He continued to be subject to dismissal for future deficiencies. His failure of the NBME was such a deficiency. J.A. 72.

B. Only the Faculty Could Properly Determine Whether Ewing Was "Qualified" to take a Retest.

Respondent also tries to side step the facts of his warning by first confusing "deficiency" with "warning" and by then arguing that when the deficiency referred to in the warning letter of July 30, 1980 (J.A. 146), was removed by the letter of January 26, 1981 (J.A. 115), he was no longer under warning and was therefore "qualified" to take the retest under a supposed "rule" entitling all students to such an opportunity, regardless of their individual circumstances. Res. Brief at 33 and 42. This alleged "rule" forms the basis for Ewing's contention

that the court of appeals merely applied a clear principle of law without interfering with academic decisionmaking. *Id.* at 9-10, 32-33 and 49. Ewing's argument suffers from four fatal flaws.

First, the court of appeals did not purport to rest its decision on the existence of any "rule" such as respondent describes. On the contrary, the court of appeals found that the University acted arbitrarily because the court discerned a "consistent practice" of allowing retests and that Ewing was the only student denied a retest during the 1975-81 period. Pet. App. 33a.

Second, the critical link in respondent's argument (and the court of appeals' decision) is a comparison of Ewing's performance with the academic records of other medical students. While Ewing disclaims any intention to second-guess academic judgments in one part of his brief (Res. Brief at 33), he argues elsewhere that he was at least as, if not more, qualified to take a retest than other students who were granted the opportunity. Res. Brief at 7-8, 32, 41. To bolster this argument, Ewing goes so far as to call to the Court's attention to his present enrollment in "another fully accredited, four-year American medical school" and argues that this is further evidence of his fitness. Res. Brief at 42. All this proves is that different institutions have different admission standards and different academic standards.[1] Petitioner continues to believe that Ewing is not qualified to pursue a University of Michigan medical degree, despite his apparent success at other studies elsewhere. These arguments are incompatible with the individualized and frequently subjective judgments that must be made in assessing academic performance and

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[1] Having opened the door on this point, such statement in Ewing's brief should be clarified with the explanation that he is currently attending the Chicago College of Osteopathic Medicine, where the NBME examination has never been required for advancement and ultimate graduation with the D.O. degree. *See* PX 4 at pp. 6-7. (NBME examination administered exclusively in schools with M.D. programs).

judging a student's competence to be a physician. *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978). There could scarcely be a more intrusive and disruptive form of judicial interference with academic judgments than inferring "rules" governing academic standards from a comparison of many students' academic records. Such judicial entanglement in academic decisionmaking is not only unprecedented, but invites widespread litigation in which courts would be asked to hold that the lowest academic performance tolerated in the past should be a legally-enforceable standard of attainment for the future.

Third, both respondent and the court of appeals entirely ignore the painstaking and comprehensive review of Ewing's record, which resulted in the faculty's decision not to permit him to continue in the medical school. Pet. App. 13a-20a. There could hardly be a clearer instance than this of a good faith, academic judgment. Respondent has conceded (as he must) that any right to take a retest is restricted to "qualified" students (J.A. 59-60); yet he argues here that the medical faculty was not free to consider his past record, his probationary warning and his failure of the NBME test in assessing whether Ewing was "qualified." Even if there were a "rule" [2] granting

[2] Respondent's brief begins by referring to retests on the NBME Part I examination as a "consistent past practice" (*id.* at 2) when in fact Dean Reed, the one person Ewing agrees to have been more familiar with the Inteflex Program than any other faculty member (*id.* at 4, n. 5, 6, 7 and 25, n. 11) had testified that it was "the common practice" for promotion and review boards to allow a retest after reviewing a student's academic record. J.A. 40. Ewing takes considerable literary license with Dr. Reed's testimony in subsequently referring to this "common practice" as the medical school's "established policy" (Res. Brief at 5), and "unbroken policy and practice" (*id.*), and then elevating it to "a written rule" (*id.* at 9), and thereafter referring to it in respondent's brief as a "rule" rather than a practice. Query, when does a practice become a rule? After five students are allowed a retest? After ten? After fifty?

retests to "qualified" students, it is indeed an extraordinary interference with academic decisionmaking to deny a medical faculty any room to exercise judgment or discretion in implementing the rule and determining who is "qualified."

Fourth, respondent builds much of his argument on the erroneous premise that many courts have endorsed an "arbitrary and capricious" standard of substantive judicial review of academic decisions. Res. Brief at 18-20. The argument is based on a semantic confusion. Many cases observe that universities may not "arbitrarily" or "capriciously" dismiss students; [3] but no reported case of which we are aware holds that a court may apply an "arbitrary and capricious" *standard of review of academic factors* to determine the soundness of a decision made on academic grounds.[4] These cases instead view "arbitrary" academic decisions consistently with the substantive standard of review endorsed in *Youngberg* v. *Romeo*, 457 U.S. 307, 322-23 (1982), under which courts must refrain from intruding into professional decisionmaking unless there is evidence that such decisions are really based on improper, nonprofessional and extraneous considerations. No such issue is presented by the purely academic decision made by the University of Michigan's medical school faculty.

[3] *See*, for example, the cases cited at pages 17-19 of Respondent's Brief.

[4] Indeed, "[s]ince standards of 'irrationality' or 'arbitrariness' vary from time to time and from judge to judge, applications of the concept—indeed, the concept itself—have generated serious criticism of the judiciary and the judicial function." *Jeffries* v. *Turkey Run Consolidated School District*, 492 F.2d 1, 4 (7th Cir. 1974) (footnote omitted; discussing § 1983 substantive due process rights of dismissed public school teacher).

II. THE LOWER COURT'S ORDER VIOLATES THE ELEVENTH AMENDMENT BECAUSE IT SEEKS TO COMPEL THE REGENTS TO COMPLY WITH STATE LAW.

If this Court should somehow conclude that there *was* such a rule as the one for which respondent contends, then the Sixth Circuit's order constitutes an order by a federal court compelling state officials to conform their conduct to state law. "[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Pennhurst State School and Hospital* v. *Halderman*, 465 U.S. 89, 79 L. Ed. 2d 67, 82 (1984).

CONCLUSION

Based upon the foregoing argument and authorities, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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